UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

A. H. R., et. al., Plaintiffs, v. WASHINGTON STATE HEALTH CARE AUTHORITY, et al., Defendants.	CASE NO. C15-5701JLR ORDER REGARDING MOTION FOR PRELIMINARY INJUNCTION AND RELATED MOTIONS

I. INTRODUCTION

Plaintiffs A.H.R., S.K., K.A.S., Z.O.S.,[1] and K.V. are a group of infants and toddlers who, because of their complex medical needs, require skilled nursing services

[1] On December 29, 2015, Plaintiffs' counsel notified the court and opposing counsel of the death of Z.O.S. (Notice of Death (Dkt. # 49).) The court notes that Federal Rule of Civil Procedure 25 provides that if the claim is not extinguished the decedent's successor or representative may file a motion for substitution within 90 days after service of a statement noting death. Fed. R. Civ. P. 25(a)(1). If the motion for substitution "is not made within 90 days after service of a statement noting death, the action by . . . the decedent must be dismissed." *Id.*

around the clock. Defendant Washington State Health Care Authority ("HCA"),[2] which is the state agency responsible for administering Washington State's Medicaid program, does not dispute that Plaintiffs are entitled in-home, private duty nursing care through the Medicaid program.[3] (*See* PI Resp. (Dkt. # 32) at 1 ("The issue here is *not* whether [Plaintiffs] are entitled to medically necessary nursing services from the Medicaid Program. They are.").) Despite this acknowledgement, HCA has failed to fully provide these services to Plaintiffs. The present suit arises from these circumstances.

Before the court are three motions: (1) Plaintiffs' motion for a preliminary injunction (PI Mot. (Dkt. # 6)); (2) HCA's motion to compel joinder of three managed care organizations ("MCOs") or, in the alternative, for partial dismissal for failure to join these allegedly indispensable parties under Federal Rule of Civil Procedure 19 (Rule 19 Mot. (Dkt. # 24)); and (3) HCA's motion to continue the noting date for Plaintiffs' motion for a preliminary injunction (Mot. to Continue (Dkt. # 28)). The court has considered the motions, all related submissions from the parties, the balance of the

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A statement noting death must be served on the parties as provided in Federal Rule of Civil Procedure 5 and on nonparty successors or representatives of the deceased as provided in Federal Rule of Civil Procedure 4. *See* Fed. R. Civ. P. 25(a)(3); *Barlow v. Ground*, 39 F.3d 231, 233-34 (9th Cir. 1994). The 90-day period within which a substitution motion may be made is not ordinarily triggered until such service occurs. *See id.*

[2] In addition to HCA, Plaintiffs have also sued Maryanne Lindebald, who is the state's Medicaid director and responsible for oversight of the state's Medicaid program, and Dorothy Frost Teeter, who the director of HCA. (*See* Compl. (Dkt. # 1) ¶¶ 17-18; Am. Compl. (Dkt. # 5) ¶¶ 19-20.) Plaintiffs have sued both Ms. Lindebald and Ms. Teeter in their official capacities only. (*See id.*) The court refers to all Defendants collectively as "HCA."

[3] The services at issue in this case are known variously as in-home nursing, private duty nursing, or the medically intensive children's program. (*See* PI Resp. (Dkt. 32) at 7; Kreiger Decl. (Dkt. # 33) ¶ 4.)

record, and the applicable law. In addition, the court heard the oral argument of counsel on January 5, 2016. Being fully advised, the court GRANTS Plaintiffs' motion for a preliminary injunction as more fully described below,[4] DENIES HCA's Rule 19 motion, and GRANTS HCA's motion to continue.

II. FACTUAL BACKGROUND & FINDINGS OF FACT

A. Statutory Framework

Medicaid is "[one] element of a comprehensive plan to provide universal health insurance coverage" and is designed "to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, --- U.S. ---, 132 S. Ct. 2566, 2606 (2012). Medicaid is a cooperative federal-state program that is jointly financed and administered by the states according to federal guidelines. 42 U.S.C. §§ 1396 *et. seq.*; 42 C.F.R. § 430.0. "Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures." 42 C.F.R. § 430.0. To receive federal funding, however, a state must comply with federal Medicaid

[4] In accordance with Federal Rules of Civil Procedure 52(a) and 65(d), this order shall constitute the court's findings of fact and conclusions of law setting forth the grounds for issuance of the preliminary injunction. *See* Fed. R. Civ. P. 52(a); Fed. R. Civ. P. 65(d). Although the court has not labeled individual paragraphs specifically as findings of fact or conclusions of law, such labels are not necessary. *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217, at *4 (W.D. Wash. Apr. 25, 2013). The nature of the findings and conclusions to follow is apparent. *See Tri–Tron Int'l v. A.A. Velto*, 525 F.2d 432, 435-36 (9th Cir. 1975) ("We look at a finding or a conclusion in its true light, regardless of the label that the district court may have placed on it. . . . [T]he findings are sufficient if they permit a clear understanding of the basis for the decision of the trial court, irrespective of their mere form or arrangement.") (citations omitted); *In re Bubble Up Delaware, Inc.*, 684 F.2d 1259, 1262 (9th Cir. 1982) ("The fact that a court labels determinations 'Findings of Fact' does not make them so if they are in reality conclusions of law.").

law. *See Armstrong v. Exceptional Child Ctr., Inc.*, --- U.S. ---, 135 S. Ct. 1378, 1382 (2015) ("Medicaid offers the States a bargain: Congress provides federal funds in exchange for the State's agreement to spend them in accordance with congressionally imposed conditions.").

Each state must submit to the federal government a "State Plan for Medical Assistance," which describes how the state will administer Medicaid and assuring compliance with federal law. *See id.* The Centers for Medicare and Medicaid Services ("CMS") must approve the State Plan and any amendments. *See* 42 C.F.R. §§ 430.10, 430.14; *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003). CMS has the authority to withhold all or a portion of a state's Medicaid funding if it concludes that the state is out of compliance with federal Medicaid requirements. *See* 42 U.S.C. § 1396c; 42 C.F.R. §§ 430.1, 430.35(a), 430.40(a), 430.42(a), 447.304(c); *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604.

Federal law requires that each State Plan "provide for the establishment or designation of a single State agency to administer or to supervise the administration of" the Plan. *See* 42 U.S.C. § 1396a(a)(5); *see also* 42 C.F.R. § 431.10(b)(1); *Watson v. Weeks*, 436 F.3d 1152, 1161 (9th Cir. 2006). The chosen agency may not delegate to others its "authority to supervise the plan or to develop or issue policies, rules, and regulations or program matter." 42 C.F.R. § 431.10(e)(1). The Washington State Legislature has designated HCA as the agency responsible for administering Medicaid in

Washington and obtaining federal approval for the State Plan.[5] *See* RCW 41.05.021(1)(m)(i); RCW 74.09.530(1)(a).

Medicaid clients receive their medical care either through a "fee-for-service" system or a "managed care" system. *G. v. State of Hawaii*, 703 F. Supp. 2d 1078, 1084 (D. Haw. 2010). Under the fee-for-service model, "the state contracts directly with and pays healthcare providers . . . for services they provide to Medicaid beneficiaries." *Id.* Under managed care, the state enters into contracts with MCOs which then provide the required Medicaid services to Medicaid beneficiaries "through their own employees or by contracting with independent providers." *Id.* There are approximately 246 children in the State's Medicaid program currently receiving private duty nursing services. (Kreiger Decl. ¶ 7.) Of these, 182 children are in the fee-for-service program and approximately 64 children are served through an MCO. (*Id.*)

Under the managed care model in Washington, HCA provides a monthly premium to an MCO for each enrolled Medicaid client and, in return, the MCO provides the required medical care to the Medicaid client. WAC 182-538-067(1); WAC 182-538-070(1); *see also St. John Med. Ctr. v. State*, 38 P.3d 383, 386 (Wash. Ct. App. 2002) ("In 1993, [the State] began to contract with managed care organizations or providers for managed care services to Medicaid recipients at a set rate per plan participant."). Each MCO is required to provide HCA adequate assurances that the MCO has the capacity to

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[5] HCA partners with the Washington State Department of Social and Health Services ("DSHS") in connection with certain Medicaid services, such as programs for disabled clients. *See* RCW 41.05.021(1)(m)(iii); (Cody Decl. (Dkt. # 25) ¶ 3).

maintain a sufficient number, mix, and geographic distribution of health care providers to meet the needs of their Medicaid clients and the network and quality standards of HCA. *See* 42 U.S.C. § 1396u-2(b)(5); WAC 182-538-067(1)(c). Medicaid clients who are dissatisfied with the services provided by their MCO can initiate an internal grievance and appeal process within the MCO, and then, if needed, appeal to HCA. *See* 42 U.S.C. § 1396u-2(b)(4); 42 C.F.R. § 438.402; WAC 182-538-110.

One aspect of the Medicaid program is known as the Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") program. *See* 42 U.S.C. § 1396a(a)(43); *Katie A., ex rel. Ludin v. L.A. Cty.*, 481 F.3d 1150, 1154 (9th Cir. 2007). As a general proposition, under the EPSDT program, the State must provide all forms of medical assistance to Medicaid clients under the age of 21. *See* 42 U.S.C. § 1396d(r)(5) (defining services); *Katie A., ex rel. Ludin*, 481 F.3d at 1154. "The EPSDT obligation is thus extremely broad." *Katie A., ex rel. Ludin*, 481 F.3d at 1154. States must provide all of the services listed in 42 U.S.C. § 1396d(a) to eligible children when such services are found to be medically necessary. *Id.*

The list of services in § 1396d(a) includes "private duty nursing services." *See* 42 U.S.C. § 1396d(a)(8). Indeed, HCA admits that "in-home nursing care for Medicaid clients under age 21 is a mandatory service." (PI Resp. at 9.) EPSDT is also listed as a required service in HCA's contracts with the MCOs. (Cody Decl. ¶¶ 6-7.) There is no dispute that HCA has determined that Plaintiffs are eligible for Medicaid benefits and HCA or one of HCA's MCOs has authorized each Plaintiff to receive in-home, private

duty nursing care for at least 16 hours per day. (*See* PI Resp. at 10; *see also* Kreiger Decl. ¶¶ 11-12, 15, 20; Edlund Decl. (Dkt. # 35) ¶ 5.)

B. Plaintiffs' Factual Circumstances

Despite the fact that HCA has determined that each Plaintiff is eligible for and HCA (or one of its MCOs) has authorized the provision of in-home, private duty nursing care for at least 16 hours per day for each Plaintiff, none of the Plaintiffs are receiving this amount of nursing care in their homes. All of the Plaintiffs were referred to a home health agency that provides private duty nursing services for children in Washington State, including Medicaid enrolled children. (Smith Decl. (Dkt. # 17) ¶ 7.) The agency was unable to recruit nurses to provide the 16 hours per day of private duty nursing to which each Plaintiff is entitled. (*Id.*) The agency is unable to find qualified nurses who are willing to work for the rates available for Medicaid-enrolled children. (*Id.* ¶ 3.) The Medicaid pay rate for private duty nursing has not increased since July 2007. (Austin Decl. (Dkt. # 14) ¶ 4.)[6]

A.H.R. is a Medicaid client enrolled with an MCO, and he has been authorized to receive 16 hours per day of in-home nursing care. (Valderrama Decl. (Dkt. # 30) ¶ 2;

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[6] HCA argues that the court should disregard the declarations of Ms. Molly Austin (Austin Decl.) and Ms. Sheri Smith (Smith Decl.) as self-serving. (PI Resp. at 15-16.) The declarants at issue are employees of home health agencies that provide private duty nursing to Washington residents. (Smith Decl. ¶ 2 (administrator); Austin Decl. ¶ 2 (chief operating officer).) There is no evidence that either Ms. Smith or Ms. Austin will benefit directly if Plaintiffs prevail on their motion for a preliminary injunction or in this lawsuit generally. There is no evidence that the testimony of Ms. Smith or Ms. Austin is any more self-serving than the testimony of any of Defendants' employees. The court finds HCA's argument peculiar because HCA has acknowledged that the reimbursement rate for private duty nursing is too low in its recent written statements to the Governor's office. (*See infra* § II.C.)

Kreiger Decl. ¶ 12.) A.H.R., who is less than one year old, resides in a group home for medically fragile children because at the time of his discharge from Seattle Children's Hospital on August 28, 2015, his family could not secure private duty, skilled nursing care to meet his needs at their home. (Gallagher Decl. (Dkt. # 8) ¶¶ 7-11; *see also* Valderrama Decl. ¶ 5.) A.H.R. receives the level of skilled nursing care in the group home that his physicians have ordered (Valderrama Decl. ¶ 5), but to do so he is forced to live separate from his family (Gallagher Decl. ¶ 9). In the opinion of A.H.R.'s doctor, "[t]he healthiest place for a child like A.H.R. is at home with his family." (*Id.* ¶ 10.) Further, A.H.R. has a hearing impairment and requires consistent one-to-one attention to develop his communication skills. (Aspinall Decl. (Dkt. # 42) ¶ 5.) He is unable to receive the consistent one-to-one attention he needs at the group home. (*Id.* ¶ 6.)

S.K.,[7] who is two years old, relies on a mechanical ventilator to breathe. (Redding Decl. (Dkt. # 9) ¶¶ 4-5.) S.K. requires at least 16 hours per day of private duty nursing to live safely at home. (*Id.* ¶¶ 10-11.) HCA has authorized S.K. to receive this much nursing care. (Kreiger Decl. ¶¶ 15, 20; K.J. Decl. (Dkt. # 11) ¶ 4.) Since S.K. was discharged from Seattle Children's Hospital in November 2014, his family has had difficulty recruiting a sufficient number of in-home, skilled nurses to provide S.K. with 16 hours per day of nursing care. (K.J. Decl. ¶¶ 7-8.) Presently, S.K.'s family receives only five nights of nursing care per week and no nursing care during the day. (*Id.* ¶ 8.)

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[7] S.K. is the only plaintiff in the fee-for-service portion of the State's Medicaid program. (Kreiger Decl. ¶ 14.)

As a result, S.K.'s father must stay awake all night to attend to him on nights when the family has no nursing assistance. (*Id.*) S.K.'s parents are exhausted as a result of his care and worry that they could make a mistake in caring for him without a nurse to assist. (*Id.* ¶ 11.) S.K. is at risk of being placed in a group home if additional nursing care is not found for him soon. (*Id.* ¶ 10.) The parties dispute additional reasons that may inhibit the recruitment and retention of private duty nurses for S.K.[8]

K.V. is a Medicaid client enrolled with an MCO. (*See* Collymore Decl. (Dkt. # 31) ¶ 2.) Like S.K., K.V. is dependent on a ventilator to breathe. (T.V. Decl. (Dkt. # 16) ¶¶ 4-5.) K.V.'s mother parents K.V. alone. (*See id.* ¶ 6.) Due to an emergency, K.V. was hospitalized at Seattle Children's Hospital on June 25, 2015. (*Id.* ¶ 7.) K.V.

[8] HCA has submitted testimony indicating that the recruitment of nurses for S.K. appears to be complicated by additional factors including (1) that S.K. has lived part of the time in a hotel or other small accommodations, (2) that Child Protective Services ("CPS") had some involvement with the family, and (3) conflict between the assigned nurses and S.K.'s parents. (*See* Kreiger Decl. ¶¶ 18-21.) Plaintiffs object that the testimony upon which HCA relies is based largely on hearsay. (PI Reply (Dkt. # 39) at 11-12.) The rules of evidence do not strictly apply in the context of a motion for preliminary injunction, and accordingly the court does not abuse its discretion by considering hearsay evidence. *See Republic of the Phil. v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). "The exigencies of preliminary relief often prevent the movant from procuring supporting evidence in a form that would meet Rule 56's requirement of evidence admissible at trial." *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1562 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997). Evidence such as hearsay testimony may be considered by the court in the context of a motion for preliminary injunction, but the court has discretion to weigh the evidence as required to reflect its reliability. *Id.* The court notes the hearsay quality of HCA's evidence in this regard. In addition, Plaintiffs have submitted contrary testimony. (*See generally* 2d K.J. Decl. (Dkt. # 41).) Although S.K.'s mother acknowledges that she needed to live for a short time in a hotel and that other living arrangements for S.K. have been small, she states that there has always been sufficient room for S.K.'s crib and necessary equipment and that her home is clean. (*Id.* ¶¶ 6, 12.) She testifies that, although a CPS social worker investigated some allegations concerning S.K.'s living circumstances, the social worker determined that there "was nothing behind the[] allegations." (*Id.* ¶ 5.) She also disputes that she fired or rejected any nurses because she did not like them, instead asserting that she did so for appropriate reasons concerning S.K.'s care. (*Id.* ¶¶ 9-11, 16.)

was medically ready to be discharged on June 28, 2015, but K.V.'s family could not secure 16 hours per day of private duty nursing care at home. (*Id.*) As a result, K.V. was not discharged from the hospital until October 2, 2015, more than three months after K.V. was medically ready to be discharged. (*Id.* ¶ 8.) K.V.'s family is still not able to obtain more than five day shifts of nursing care each week. (*Id.*) As a result, K.V.'s mother must go more than 24 hours without sleep on some days until nursing care arrives. (*Id.*)

K.A.S. is a Medicaid client enrolled in an MCO. (*See* Edlund Decl. ¶ 4.) K.A.S. is one year old with many serious medical problems. (Evans Decl. (Dkt # 7) ¶¶ 3-9.) On September 15, 2015, the nursing agency that staffs K.A.S.'s private duty nurses informed K.A.S.'s mother that as of September 23, 2015, there would be no nurses available to assist with K.A.S.'s care in the family's home. (*Id.* ¶ 15; I.S. Decl. (Dkt. # 13) ¶ 4.) As a result, K.A.S.'s parents provide all of her care at home. (I.S. Decl. ¶ 5.) K.A.S. requires private duty nursing in her home and without it she will likely be placed in a hospital or other institutional setting. (Evans Decl. ¶ 17.) HCA has submitted evidence indicating that it has provided some but not all of the private duty nursing hours for which K.A.S. has been approved, and that at least part of the difficulty in providing K.A.S. with sufficient nursing is that there are limited nursing resources available in the remote area of Washington in which K.A.S. lives. (*See generally* Edlund Decl.)[9]

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[9] In addition to the foregoing plaintiffs, Z.O.S. was also listed as a plaintiff in the original and amended complaints. (*See* Compl. ¶ 3; Am. Compl. ¶ 3.) As noted above, however, on December 29, 2015, Plaintiffs' counsel filed a notice of death concerning Z.O.S. *See supra* note 1. Z.O.S. was a Medicaid client enrolled with an MCO. (Collymore Decl. ¶ 2.) Like A.H.R., Z.O.S., who was two years old at the time of his death, resided in a group home for medically

C. Decision Package

In October 2015, HCA submitted a request to the Governor's office for additional funding for the medically intensive children's program for the state fiscal year beginning July 1, 2016. (Crain Decl. (Dkt. # 22) ¶ 2, Ex. B.) The request is known as a "Decision Package." (*Id.* at 1.) In the Decision Package, HCA states that it needs the additional funding "to increase payment rates . . . to address decreased access to skilled nursing in the home setting for a child who requires four to 16 hours of medically intensive care." (*Id.*) HCA also states that "[t]he current reimbursement rate is not competitive or sufficient to prompt skilled nursing agencies to hire more staff to fill the need," and the agencies "report they cannot compete with hospital nursing salaries as the rate of reimbursement from Medicaid is so low." (*Id.*) HCA notes that "hospitals that specialize in intensive children's care are calling . . . HCA to express their concern about the lack of discharge options available to children who are stable and ready for discharge to skilled nursing care." (*Id.* at 2.) Finally, HCA acknowledges that paying for private duty nursing care is more cost effective than paying for extended hospital stays or other forms of institutionalization that become necessary when private duty nursing is unavailable. (*Id.* ("Paying for skilled nursing services . . . is a more cost-effective use of health care

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fragile children. (Striegl Decl. (Dkt. # 10) ¶ 10.) At the time of his death, Z.O.S. lived apart from his family because at the time of his discharge from Seattle Children's Hospital on February 18, 2015, his family could not find sufficient at-home, skilled nursing care to meet his needs. (*Id.* ¶¶ 12-15.) Prior to his hospitalization, Z.O.S. lived with at home with his family with skilled nursing support for 16 hours per day. (*Id.* ¶ 6.) However, even if a proper party, such as a successor or representative of Z.O.S., timely files a motion of substitution in this case pursuant to Federal Rule of Civil Procedure 25, any preliminary injunction issued by the court with respect to the provision of private duty nursing would no longer apply to that party due to Z.O.S.'s death.

dollars than extended hospital stays, which costs more for [the state's Medicaid program], hospitals and the patients, who can be exposed to sources of infection and adverse health care outcomes, which can require more treatment and consumes more health care dollars.").)

III. ANALYSIS & CONCLUSIONS OF LAW

The parties have filed three motions: (1) Plaintiffs' motion for a preliminary injunction requiring HCA to provide Plaintiffs with 16 hours per day of private duty nursing care, (2) HCA's Rule 19 motion to require joinder of certain MCOs, and (3) HCA's motion to continue Plaintiffs' motion for a preliminary injunction. The court will address these motions in reverse order.

A. HCA's Motion to Continue the Noting Date of Plaintiffs' Motion for a Preliminary Injunction

HCA has moved the court for an order to continue the noting date of Plaintiffs' motion for a preliminary injunction until after the court decides HCA's Rule 19 motion. (Mot. at 2.) Plaintiffs noted their motion for a preliminary injunction on October 8, 2015. (PI Mot. at 1.) HCA noted its Rule 19 motion on November 13, 2015. (Rule 19 Mot. at 1.) The "noting" date of a motion is nothing more than the day on which a motion is fully briefed by the parties and ready for the court's consideration. *See* W.D. Wash. Local Rules LCR 7(d). In its motion, HCA urges the court to consider its Rule 19 motion prior to Plaintiffs' motion for a preliminary injunction. (*See generally* Mot.) As a practical matter, by the time the court began its consideration of either motion, the parties had already fully briefed both motions. (*See generally* Dkt.) As a result, HCA's motion

to continue Plaintiffs' motion for a preliminary injunction until after the court has an opportunity to consider HCA's Rule 19 motion is for all intents and purposes now moot. Nevertheless, because the court is now in fact considering the parties' pending motions in the order in which HCA desires, the court grants HCA's motion.

B. HCA's Rule 19 Motion

HCA moves the court under Federal Rule of Civil Procedure 19 for an order requiring the joinder of three MCOs through which four of the five Plaintiffs receive their Medicaid services.[10] (*See generally* Rule 19 Mot.; Cody Decl. (Dkt. # 25) ¶ 8.) HCA asserts that the court should either direct the joinder of these MCOs as necessary parties under Rule 19 or dismiss the claims of the four Plaintiffs who receive their care from MCOs. (Rule 19 Mot. at 1-2.) As the moving party, HCA bears the burden of establishing that the MCOs are necessary parties. *Nev. Eighty-Eight, Inc. v. Title Ins. Co. of Minn.*, 753 F. Supp. 1516, 1522 (D. Nev. 1990) ("[T]he burden of proving that joinder is necessary rests with the party asserting it."); *see also Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (citing *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)) ("The moving party has the burden of persuasion in arguing for dismissal [in a Rule 19 motion.]").

Rule 19(a), which governs the circumstances under which persons must be joined as parties, provides in relevant part:

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[10] Plaintiffs receiving their Medicaid services through an MCO include: A.H.R., K.A.S., K.V. and Z.O.S. (*See supra* § II.B.) As noted above, however, Plaintiffs' counsel filed a notice of death concerning Z.O.S. on December 29, 2015. (*See supra* note 1.)

> **(1) Required Party.** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
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> > **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or
> >
> > **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> >
> > > **(i)** as a practical matter impair or impede the person's ability to protect the interest; or
> > >
> > > **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1) (bolding in original).

The application of Rule 19(a) involves three successive steps. *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir. 2005), *abrogated on other grounds*, *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). First, the court must determine whether a nonparty should be joined under Rule 19(a). *Wilbur*, 423 F.3d at 1112. The term "necessary" is used to describe those parties to be joined if feasible. *Id.* "The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application." *Shermoen* , 982 F.2d at 1317. "If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined." *Wilbur*, 423 F.3d at 1112. "Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an 'indispensable party' such that the action must be dismissed." *Id*.; *see also Shermoen*, 982 F.2d at 1317 (a court must determine whether the absent

party is "indispensable" "so that in 'equity and good conscience' the suit should be dismissed.").

The second and third steps are not at issue here. The MCOs do not oppose joinder if the court determines that the MCOs are necessary parties under step one. (*See* Stephens Decl. (Dkt. # 29) ¶ 3 ("Counsel for all three [MCOs] have represented . . . that their clients do not oppose being joined in this lawsuit, provided they are allowed the time by the ruled for submitting pleadings.").) No party has asserted that joinder of the MCOs is not feasible if the court were to determine that they are necessary parties to the lawsuit. The only issue here is whether the MCOs are in fact "necessary" parties.

"A party may be necessary under Rule 19(a) in three different ways." *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012). First, under Rule 19(a)(1)(A), "a person is necessary if, in his absence, the court cannot accord complete relief among existing parties." *Id*. (citing Fed. R. Civ. P. 19(a)(1)(A)). "Second, a person is necessary if he has an interest in the action and resolving the action in his absence may as a practical matter impair or impede his ability to protect that interest." *Salt River*, 672 F.3d at 1179 (citing Fed. R. Civ. P. 19(a)(1)(B)(i)). "Third, a person is necessary if he has an interest in the action and resolving the action in his absence may leave an existing party subject to inconsistent obligations because of that interest." *Salt River*, 672 F.3d at 1179 (citing Fed. R. Civ. P. 19(a)(1)(B)(ii)). As a fourth consideration, even when a party has an interest in the litigation, that party may not be necessary under Rule 19(a) if the absent party is "adequately represented" by a present party. *Salt River*, 672 F.3d at 1180-81. The court considers each possibility in turn.

1. Complete relief among existing parties

As noted above, under Rule 19(a)(1)(A), a person is a necessary party if, in the person's absence, the court cannot accord complete relief among existing parties. *See* Fed. R. Civ. P. 19(a)(1)(A). Complete relief under Rule 19(a)(1)(A) is concerned with "consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." *Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013). To be "complete," relief must be "meaningful as between the parties." *Id.* (quoting *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 879 (9th Cir. 2004)).

HCA argues that the court could not accord complete relief to MCO-enrolled Plaintiffs because "it is from the MCOs, not [HCA], from whom [sic] they receive medically necessary services on a day-to-day basis." (Rule 19 Mot. at 8-9.) Further, HCA argues that the MCOs "have committed themselves, through their contracts with [HCA], to ensure those services are actually provided." (*Id.* at 9.) Plaintiffs respond that the fact that HCA has contracted with the MCOs to provide the statutorily required care to Plaintiffs does not mean that the court cannot award meaningful relief in the MCOs' absence, and the court agrees. "Even if a state delegates the responsibility to provide treatment to other entities such as local agencies or managed care organizations, the ultimate responsibility to ensure treatment remains with the state." *Katie A., ex rel. Ludin.*, 481 F.3d at 1159 (citing *John B. v. Menke*, 176 F. Supp. 2d 786, 801 (M.D. Tenn. 2001) (holding that a state cannot "disclaim responsibility for the ultimate provision of EPSDT-compliant services by a once-removed provider")). It is HCA, not the MCOs,

that bears the responsibility to ensure that the State Plan complies with federal law and that Plaintiffs received the required treatment. Indeed, as Plaintiffs point out, HCA could disenroll Plaintiffs from the MCOs and arrange for them to receive the required nursing care. (Rule 19 Resp. (Dtk. # 43) at 7 (citing Cody Decl. (Dkt. # 25) Exs. B at 61-62, C at 61-62, D at 61-62).) HCA never directly disputes this fact.[11] Further, even if Plaintiffs are not disenrolled from the MCOs, HCA acknowledges that it "certainly could enforce the terms of [its] contracts [with the MCOs]." (Rule 19 Mot. at 9.) Thus, the court cannot conclude that an award of "meaningful relief as between the parties" is impossible in the absence of the MCOs. *See Alto*, 738 F.3d at 1126; *see also Robertson v. Jackson*, 972 F.2d 529, 535-36 (4th Cir. 1992) (ruling, in an action to enjoin the Commissioner of the Virginia Department of Social Services to bring state food stamp program into compliance with federal act, that it was unnecessary to join the State Board of Social Services and local social services agencies because neither the State Board nor the local agencies were shown to be an impediment to the achievement of full compliance with federal law and the Commissioner did not show that an order from the State Board to local agencies was necessary to ensure compliance).

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[11] HCA never expressly disputes that it could shift the four Plaintiffs at issue here out of managed care. (*See generally* Rule 19 Reply (Dkt. # 44).) Instead, HCA raises the specter that Plaintiffs are suggesting that HCA "just shift all medically intensive children from managed care to fee-for-service." (*Id.* at 3.) Plaintiffs make no such suggestion. (*See generally* Rule 19 Resp.) There are only four infant or toddler Plaintiffs who are enrolled in an MCO and at issue in this lawsuit. (Cody Decl. ¶ 8.) This case is not a putative class action. (*See generally* Am. Compl.) This issue in this lawsuit is the provision of appropriate private duty nursing benefits to the five Plaintiffs before the court. The specter HCA raises—having to disenroll all medically intensive children from managed care—is a straw man that the court disregards.

In *Disabled Rights Action Committee v. Las Vegas Events, Inc*, 375 F.3d 861 (9th Cir. 2004), an advocacy organization sued the sponsor and presenter of a rodeo alleging violations of the public accommodation provision of the Americans with Disabilities Act ("ADA"). *Id.* at 866-67. One of the defendants moved under Rule 19 to join the state university system, which owned the arena where the rodeo was held. *Id.* at 867. The district court granted the motion and directed the advocacy organization to join the state university system. *Id.* The Ninth Circuit held that the district court erred "by failing to consider whether remedies not requiring [the state university system's] cooperation would provide meaningful relief." *Id.* at 879. The Ninth Circuit concluded that the licensing agreement between the state university system and presenter did not prevent the presenter from taking action to make the rodeo accessible, either within the scope of its lease or by holding the rodeo at an alternative accessible location. *Id.* at 880. Indeed, the Ninth Circuit noted that in the latter event, the presenter would be required to pay liquidated damages to the state university system, not hold the rodeo at the state university system's center despite its inaccessibility. *Id.* Thus, the plaintiffs could obtain their objective of having the rodeo at an accessible location irrespective of the contractual relationship between the presenter and the state university system. *Id.* Plaintiffs can similarly obtain the relief they seek irrespective of HCA's contracts with the MCOs, as discussed bove. Indeed, in *Disabled Rights*, the Ninth Circuit did not view even the specter of a contract dispute between the defendant and a third-party as requiring joinder under Rule 19(a)(1)(A). 375 F.3d at 880. Neither does this court.

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2. The Interests of the MCOs

Next, a person is a necessary party if the person has an interest in the action and resolving the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest. *See* Fed. R. Civ. P. 19(a)(1)(B)(i)). In an attempt to fit within this portion of Rule 19, HCA points to the MCOs' "administrative, operational, and financial interests," whish arise from the MCOs' contracts with HCA and the MCOs' enrollment of four of the five Plaintiffs. (Rule 19 Mot. at 9; *see also* Rule 19 Reply at 1 ("The MCOs must be joined to the case because any preliminary injunction would have an immediate and direct effect on their business practices.").) Rule 19(a)(1)(B)(i) does not protect every interest an absentee party may have. For example, "a financial stake in the outcome of the litigation" does not give rise to Rule 19(a)(1)(B)(i) necessity. *See Disabled Rights*, 375 F.3d at 880, 883. Only "legally cognizable interests," *id.* at 880, or "legally protected interests" are within the Rule's scope, *id.* at 883 (citing *Makah Indian Tribe*, 910 F.2d at 558). Thus, the interest HCA asserts on behalf of the MCOs—that the present litigation may have an effect on the MCOs' operations and bottom lines—does not constitute a "legally protected interest" under Rule 19(a)(1)(B)(i).

The fact that HCA and the MCOs are in a contractual relationship concerning the provision of health care services to Plaintiffs does not suffice as a "legally protected interest" in this context either. The Ninth Circuit has held that "a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement." *Clinton v. Babbit*, 180 F.3d 1081, 1088 (9th Cir. 1999); *see*

also Dawavendewa v. Salt River Project Agr. Imp. & Power Dist., 276 F.3d 1150, 1157 (9th Cir. 2002) ("[A] party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract."). The Ninth Circuit, however, reads its precedent in this regard narrowly. Where an action is not "an action to set aside a contract, . . . an attack on the terms of a negotiated agreement, or litigation seeking to decimate a contract," absentee signatories are not necessary parties. *See Disabled Rights*, 375 F.3d at 881 (citations, quotation marks, and alterations omitted). Plaintiffs' suit does not represent "an attack" on the agreements between HCA and the MCOs. Plaintiffs assert only claims for statutory violations against HCA with respect to HCA's obligation to provide Plaintiffs with the health care services at issue. (*See generally* Am. Compl.) Indeed, the legal claims of S.K., the only Plaintiff in Medicaid's fee-for-service program, are indistinguishable from the claims of A.H.R., K.V., and K.A.S., the Plaintiffs in Medicaid's MCO program. (*See generally id.*) Although Plaintiffs' suit may tangentially relate to HCA's contracts with the MCOs, it does not represent an attack on those contracts or seek to set them aside. Accordingly, the court concludes HCA has failed to identify any "legally protected interest" of the MCOs that requires their joinder under Rule 19(a)(1)(B)(i).

3. Inconsistent Obligations

Under Rule 19, a person also may be a necessary party if the person has an interest in the action and resolving the action in the person's absence may leave an existing party subject to inconsistent obligations because of that interest. *See* Fed. R. Civ. P. 19(a)(1)(B)(ii). HCA argues that the court should require joinder of the MCOs under

Rule 19(a)(1)(B)(ii) because resolving Plaintiffs' suit may leave HCA "subject to inconsistent obligations" due to its "ongoing reliance on the MCOs to adhere to their own contractual obligations." (*See* Rule 19 Mot. at 9.) HCA, however, fails to offer any specific factual basis or explanation as to how this suit might leave it subject to inconsistent obligations if the MCOs adhere or fail to adhere to their contractual obligations. The fact that HCA may be faced with enforcing its contractual rights against the MCOs or may be subject to the payment of contractual damages to the MCOs as a byproduct of this litigation does not constitute being subject to "inconsistent obligations" under Rule 19(a). *See* Fed. R. Civ. P. 19(a)(1)(B)(ii).

The Ninth Circuit counsels that "[i]nconsistent obligations are not the same as inconsistent adjudications or results." *See Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 976 (9th Cir. 2008) (alterations omitted) (adopting the approach taken by the First Circuit and quoting *Delgado v. Plaza Las Ams., Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) (per curiam)). Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. *Id.* The court agrees with Plaintiffs that HCA cannot encounter the risk of inconsistent obligations in this case because the MCOs and Plaintiffs share no common cause of action against HCA. Plaintiffs' causes of action are based on their statutory private rights of action to Medicaid services and disability accommodations. HCA, on the other hand, faces potential contractual disputes with its MCOs. Even if, hypothetically, HCA were found to have violated Plaintiffs' statutory rights and another court found that either HCA or the MCOs had their breached

contractual obligations to one another, nothing in this scenario suggests that HCA would be faced with inconsistent court orders. The fact that HCA may face the possibility of contractual disputes with its MCOs while simultaneously adhering to its statutory obligations to provide private duty nursing to Plaintiffs does not rise to the level of a "substantial risk" of incurring "inconsistent obligations." *See id.* (citing Fed. R. Civ. P. 19(a)(1)(B)(ii)).

4. Adequate Representation

Even if the MCOs have an interest in Plaintiffs' suit against HCA, the MCOs may not be necessary parties under Rule 19(a) if their interests are otherwise adequately represented here. *See Salt River*, 672 F.3d at 1180-81.[12] The court considers three factors in determining whether an existing party adequately represents the interests of an absent party: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments"; and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Id.* at 1180 (quoting Shermoen,982 F.2d at 1318).

The Ninth Circuit's decision in *Salt River* illustrates how these rules should be applied. In *Salt River*, the owner and operator of a power plant on Navajo Nation land

[12] The parties do not address this issue, but the court does because the failure to do so may be reversible. *See Salt River*, 672 F.3d at 1180 ("As we said in *Shermoen*, [982 F.2d at 1318,] '[i]f a legally protected interest exists, the court must further determine whether that interest will be *impaired* or *impeded* by the suit. Impairment may be minimized if the absent party is adequately represented in the suit.'") (italics in original).

were defendants in an employment case brought in the tribal court. *Id.* at 1177. In a federal-court declaratory judgment action against Navajo officials, the power plant sought to bar the application of tribal law to the employment case. *Id.* at 1177-78. The tribe was absent from the federal case, and the tribal officers argued that the tribe was a necessary party to the litigation because the complaint challenged the lease agreement. *Id.* at 1178. The district court agreed and dismissed the action under Rule 19 because the tribe could not be joined due to sovereign immunity. *Id.* The Ninth Circuit reversed the district court, finding that the tribal officials adequately represented the tribe. *Id.* at 1180-81. The officials' interests were aligned with the tribe's interests. *Id.* at 1180. No evidence suggested that the officials would be unable to make every reasonable argument the tribe itself would make. *Id.* And no evidence suggested the tribe would "offer any necessary elements to the action that the Navajo officials would neglect." *Id.* at 1180-81. The Navajo tribe was therefore not a necessary party, and the case could proceed. *Id.* at 1182.

Here, the interests of HCA and the MCOs are similarly aligned. HCA acknowledges that "[w]hile [HCA] remains ultimately responsible for the administration of the Medicaid program" (Rule 19 Mot. at 2), "[t]he MCOs . . . have contracts under which they have assumed the obligation of providing virtually all medically necessary services" to four of the five Plaintiffs in this suit (*id.* at 1). Further, HCA and the MCOs are obligated under their contracts to "fully cooperate" with each other in the conduct of this litigation, including "by providing without additional fee all reasonably available information relating to such actions and by providing necessary testimony." (Cody Decl.

Exs. B at 35, C at 35, D at 35.) Thus, the interests of HCA and the MCOs are overlapping with respect to Plaintiffs' claims, and the contractual provisions regarding cooperation ensure that the MCOs will share with HCA any evidence they may have that is relevant to this suit. In addition, the court finds no reason to believe that the MCOs can make arguments that HCA cannot, and the conduct of the litigation to date suggests no such deficiency. Accordingly, the court concludes that HCA is likely to make and is capable of making all the same arguments that the MCOs would make. *See Salt River*, 672 F.3d at 1180.

Finally, the court cannot conclude that the MCOs would add any element to this proceeding that HCA would neglect. *See id.* HCA reserves the right in its contracts with the MCOs "to issue unilateral amendments which provide corrective or clarifying information," and the contracts specify that any provisions that are found to be "in conflict with applicable state or federal laws or regulations" are automatically "amended to conform to the minimum requirements of such laws or regulations." (*See* Cody Decl. Exs. B at 30, C at 30, D at 30.) Thus, in the event this litigation results in a ruling that HCA violated any federal statutory rights of Plaintiffs in a manner that impacts HCA's contracts with the MCOs, HCA has the contractual authority to alter those contracts unilaterally or automatically. The court, therefore, cannot conclude that the MCOs "would offer any necessary element to the proceedings that the present parties would neglect." *See Salt River*, 672 F.3d at 1180.

In sum, HCA has failed to meet its burden under Rule 19(a) of demonstrating that the MCOs are necessary parties to this litigation. HCA has failed to demonstrate that (1)

complete relief cannot be awarded in the absence of the MCOs, (2) the MCOs have a legally protected interest in the conduct of this litigation that is cognizable under Rule 19(a), or (3) HCA runs a substantial risk of being subject to inconsistent obligations in the MCOs' absence. Further, even if HCA could demonstrate that the MCOs have a legally protected interest in Plaintiffs' suit, those interests are adequately represented by HCA. Accordingly, the court concludes that the MCOs are not necessary parties, and denies HCA's Rule 19 motion for joinder.[13]

C. Plaintiffs' Motion for a Preliminary Injunction[14]

Plaintiffs seek a preliminary injunction under Federal Rule of Civil Procedure 65 requiring HCA to "arrange and pay for" private duty nursing care in their homes that Plaintiffs' doctors have assessed Plaintiffs need and to which HCA has acknowledged Plaintiffs are entitled. (*See* PI Mot. at 2; *see also* PI Resp. at 1 ("The issue here is *not* whether [Plaintiffs] are entitled to medically necessary nursing services from the Medicaid Program. They are." (italics in original)).) Specifically, Plaintiffs request a preliminary injunction that enjoins HCA "from failing to take all actions within [its]

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[13] Plaintiffs also argue that the MCOs should not be joined under the public rights exception to Rule 19 joinder. (Rule 19 Resp. at 13-15.) The court declines to consider this argument, however, because it found that HCA failed to carry its burden under Rule 19 without resort to this judicially created exception to Rule 19.

[14] A preliminary injunction is not a preliminary adjudication of the ultimate merits of the suit. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984). The court does not make binding findings or conclusions, it need only find probabilities that the necessary facts can be proved. *Id.*; *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."). With these precepts in mind, and pursuant to Federal Rule of Civil Procedure 65, the court considers Plaintiffs' motion for a preliminary injunction.

power necessary to make medical assistance available and to arrange for . . . Plaintiffs to receive 16 hours per day of private duty nursing, as arranged and agreed by . . . Plaintiffs and their medical providers." (Prop. PI Ord. (Dkt. # 6-1) at 12.) HCA opposes the imposition of a preliminary injunction. (*See generally* PI Resp.) The court now considers Plaintiffs' motion.

1. Standards for a Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish that he [or she] is likely to succeed on the merits, that he [or she] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his [or her] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A plaintiff may also qualify for a preliminary injunction by showing that there are serious questions going to the merits of his or her claim and that the balance of hardships tips sharply in his or her favor, so long as the irreparable harm and the public interest factors in *Winter* are also met. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

Here, however, Plaintiffs seek not just to maintain the status quo with a prohibitory injunction but to require HCA to undertake take affirmative actions—specifically, to "arrange and pay for" private duty nursing care in Plaintiffs' homes. (PI Mot. at 2.) A request for a mandatory injunction seeking relief well beyond the status quo is disfavored in the law and shall not be granted unless the facts and law clearly favor the moving party. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319-20 (9th Cir. 1994). In general, mandatory injunctions should not be granted "unless extreme or very serious

damage will result" and should not be issued "in doubtful cases or where the injury complained of is capable of compensation in damages." *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979); *see also Little v. Jones*, 607 F.3d 1245, 1251 (10th Cir. 2010) (stating that "the movant must make a heightened showing of the four factors" (citation and quotation marks omitted)). Because the standard for entry of a mandatory injunction is higher, the court declines to consider Plaintiffs' motion under the Ninth Circuit's alternative balancing test in *Cottrell*, but will stick to the more narrowly drawn test utilized by the Supreme Court in *Winter*.

2. Likelihood of Success on the Merits

Plaintiffs have asserted a claim under 42 U.S.C. § 1983 alleging that HCA violated their civil rights by failing to comply with certain provisions of the Medicaid Act (*see* Am. Compl. ¶¶ 107-16) and a claim under Title II of the ADA and Section 504 of the Rehabilitation Act of 1973 alleging that HCA failed to provide private duty nursing services in the most integrated setting appropriate to Plaintiffs' needs (*see id.* ¶¶ 117-36). The court now considers the likelihood of Plaintiffs' success on the merits of these two claims.

a. Medicaid Act

Under 42 U.S.C. § 1396a(a)(10)(A), "[a] state plan for medical assistance must provide . . . for making medical assistance available [for described services] to" all individuals who meet certain eligibility requirements. *See* 42 U.S.C. § 1396a(a)(10)(A). States must provide medical assistance "with reasonable promptness to all eligible individuals," and that assistance must not be "less in amount, duration, or scope than the

medical assistance made available to any other" beneficiary under the plan. 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10)(B).

Until recently, where the Medicaid Act referred to "medical assistance," it stated that states were responsible for providing "payment of part or all of the cost of services." 42 U.S.C. § 1396d(a) (2009). Some federal courts interpreting this language defined "medical assistance" narrowly, limiting a state's obligation to providing financial assistance only. *See, e.g.*, *Bruggeman v. Blagojevich*, 324 F.3d 906, 910 (7th Cir. 2003) ("[T]he statutory reference to 'assistance' appears to have reference to *financial* assistance rather than to actual medical *services[.]*" (italics in original)); *Westside Mothers v. Olszewski*, 454 F.3d 532, 540 (6th Cir. 2006) ("[W]e do not believe §§ 1396a(a)(8), 1396a(a)(10) require the State to provide medical services directly. The most reasonable interpretation of § 1396a(a)(8) is that all eligible individuals should have the opportunity to apply for medical assistance, i.e. financial assistance[.]"); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1146 (10th Cir. 2006) ("[T]he Medicaid statute does not require states to be service-providers of last resort . . . . The State must pay for medical services, but it need not provide them."). Other federal courts held that a state's obligation under the Medicaid Act went beyond mere payment of financial assistance. *See Bryson v. Shumway*, 308 F.3d 79, 88-89 (1st Cir. 2002) (holding that there was a valid cause of action where plaintiffs sought to require the state to provide more slots in its state waiver plan); *Doe v. Chiles*, 136 F.3d 709, 718-19 (11th Cir. 1998) (holding there was a valid cause of action where plaintiffs sought to require the state to

admit them into an intermediate care facility for the mentally retarded with reasonable promptness).

As part of the Patient Protection and Affordable Care Act, Congress amended the definition of "medical assistance" under 42 U.S.C. § 1396d(a). *See Leonard v. Makereth*, No. 11-7418, 2014 WL 512456, at *6 (E.D. Pa. Feb. 10, 2014). Under the most recent iteration of the statute, "[t]he term 'medical assistance' means payment of part or all of the cost of the following care and services *or the care and services themselves, or both[.]*" 42 U.S.C. § 1386d(a) (2013) (italics added). As one court noted, it appears that Congress intended "to clarify that where the Medicaid Act refers to the provision of services, a participating State is required to provide (or ensure the provision of) services, not merely to pay for them[.]" *John B. v. Emkes*, 852 F. Supp. 2d 944, 951 (M.D. Tenn. 2012); *see also Dunakin v. Quigley*, 99 F. Supp. 3d 1297, (W.D. Wash. Apr. 10, 2015).[15] This court agrees.

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[15] The House Committee Report on the amendment is noteworthy. It states, in relevant part:

> ["Medical assistance"] is expressly defined to refer to payment but has generally been understood to refer to both funds provided to pay for care and services and to the care and services themselves. The Committee, which has legislative jurisdiction over Title XIX of the Social Security Act, has always understood the term to have this combined meaning. Four decades of regulations and guidance from the program's administering agency, the Department of Health and Human Services, have presumed such an understanding and the Congress has never given contrary indications.
>
> Some recent court opinions have, however, questioned the longstanding practice of using the term "medical assistance" to refer to both the payment for services and the provision of the services themselves. These opinions have read the term to refer only to payment . . . . If the term meant only payments, the statutory

As noted above, there is no dispute that private duty nursing is an EPSDT service that HCA is required to provide to Medicaid clients, like Plaintiffs, who are under the age of 21. (*See supra* § II.A.; PI Resp. at 9); *see also* 42 U.S.C. §§ 1396d(a)(8), 1396d(a). Indeed, at oral argument, counsel for HCA admitted that the provision of 16 hours per day of private duty nursing care to Plaintiffs "is a legal requirement." There also is no dispute that HCA has determined Plaintiffs to be eligible for Medicaid benefits and HCA or one of HCA's MCOs has authorized each Plaintiff to receive in-home nursing care for at least 16 hours per day. (PI Resp. at 10; *see also* Kreiger Decl. ¶¶ 11-12, 15, 20; Edlund Decl. ¶ 5.) There is also no dispute that Plaintiffs S.K., K.A.S., and K.V. are not

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> requirement that medical assistance be furnished with reasonable promptness "to all eligible individuals" in a system in which virtually no beneficiaries receive direct payments from the state or federal governments would be nearly incomprehensible . . . . To correct any misunderstandings as to the meaning of the term, and to avoid additional litigation, the bill would revise section 1905(a) . . . to conform this definition to the longstanding administrative use and understanding of the term.

H.R. Rep. No. 111-299, pt. 1 at 649-50.

HCA argues that Plaintiffs' interpretation of the amendment to the term "medical assistance" is somehow "incorrect and incomplete." (PI Resp. at 13.) HCA correctly asserts that "[t]he 2010 amendment was intended to clarify the long-standing intent of Congress that 'medical assistance' did not mean simply the payment for medical services, but ensuring the provision of those services," and "did not change prior Congressional intent but only made the intent more explicit." (PI Resp. at 14.) On this basis, however, HCA implicitly argues that the amendment, in effect, changed nothing. (*See id.*) Although the amendment may be consistent with prior Congressional intent, it is not consistent with the manner in which HCA interpreted the prior statutory language. Earlier this year, the defendants in *Dunakin*, including the Director of HCA, argued before this court, even after the enactment of the new statutory language, that HCA was merely required to pay for Medicaid services and not provide them. *See Dunakin*, 99 F. Supp. 3d at 1320 ("Defendants assert that the Social Security Act requires only that they promptly pay for Medicaid-covered services, and not that they arrange for or provide for such services."). This interpretation is inconsistent with the amended statutory language. *See id.* Accordingly, the court finds this portion of HCA's briefing disingenuous and unpersuasive.

receiving the number of hours of private duty nursing in their homes to which they have been approved and are entitled, that A.H.R. is presently living in a group home for medically fragile children because he is unable to secure the private duty nursing hours at home to which he is entitled, and that A.H.R.'s family is unable to care for him at home without this assistance. (*See supra* § II.A.)

In enacting the statutes governing the requirements for state medical assistance plans under the Medicaid Act, "Congress clearly and unambiguously conferred rights" to those required services to individuals entitled to receive such benefits and "[did] not preclud[e] individual enforcement of those rights." *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 194 (3d Cir. 2004). Individuals entitled to benefits may enforce their rights under the Medicaid Act through a civil rights claim brought under 42 U.S.C. § 1983. *Sabree*, 367 F.3d at 194. Thus, Plaintiffs are entitled to enforce their rights to private duty nursing through a claim under § 1983.

Despite the foregoing facts and law, HCA argues that Plaintiffs are not likely to succeed on the merits of their § 1983 claim. HCA asserts that it has "expended considerable energy and resources in seeking and obtaining in-home nursing services and other care for [Plaintiffs]." (PI Resp. at 2.) HCA points to the number of hours of private duty nursing that it has provided to some of the Plaintiffs in their homes and the difficulties it has faced in securing more. (PI Resp. at 14-17.) HCA, however, never argues that it has provided the full in-home, private duty nursing benefit to which Plaintiffs are entitled or that it has done all it can do to secure 16 hours per day of private duty nursing for Plaintiffs. (*See generally id.*)

HCA argues that the difficulties in securing private duty nursing for some Plaintiffs may be due in part to issues specific to that particular Plaintiff. Specifically, HCA has made these arguments with respect to S.K. and K.A.S. (*See* Edlund Decl. ¶¶ 11-13; Kreiger Decl. ¶¶ 14-27; *see supra* § II.B. & note 8.) The court has noted the poor quality of some of this evidence and the rebuttal evidence submitted by Plaintiffs. (*See supra* note 8.) HCA also criticizes as self-serving certain declarations that Plaintiffs submit from administrators at private nursing agencies, who indicate that the difficulty in recruiting sufficient numbers of in-home, private duty nurses is related to HCA's low Medicaid reimbursement rates for this type of nursing. (*See* PI Resp. at 15-17 (criticizing Smith Decl. & Austin Decl.)); *see also supra* note 6. Despite HCA's arguments to this court that reimbursement rates are not at the heart of the private duty nursing hiring and retention issues here, HCA took precisely the opposite position when it sought additional funding for private duty nursing from the Governor's office in the Decision Package. (*See* Crain Decl. Ex. B; *supra* § II.C.) HCA stated that it was actually paying for more expensive care in institutional settings, such as hospitals, because the state's reimbursement rate for private duty nursing is presently too low. (*See* Crain Decl. Ex. B at 1 ("HCA is experiencing decreased access to skilled nursing care . . . . The current reimbursement rate is not competitive or sufficient to prompt skilled nursing agencies to hire more staff to fill the need. . . . Currently, there is a notable gap between supply and demand in the area of home based skilled nursing care resources.").) Given HCA's admissions in the Decision Package, the court concludes that Plaintiffs are likely to prevail over HCA on the merits of this issue.

HCA also argues that the court should not find HCA to be out of compliance with the Medicaid Act because CMS has not found HCA to be out of compliance and the court should defer to CMS. (*Id.* at 17.) HCA cites no authority for this proposition, but the court presumes that HCA is relying upon *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which courts accord substantial deference to an agency interpretation of a statute under certain circumstances. HCA, however, has submitted no evidence that CMS is aware of the issues in this lawsuit or has made any determination with respect to HCA's compliance with the Medicaid statute here. (*See generally id.*) There is, therefore, no agency decision or interpretation to which the court could defer. The court agrees with Plaintiffs that it cannot grant *Chevron* deference to an agency opinion that has not been offered. (*See* PI Reply at 9.)

Finally, HCA argues that Plaintiffs are not likely to succeed on the merits of their claim because they failed to pursue their administrative remedies prior to filing suit. (*Id.* at 18.) Plaintiffs are correct, however, that there is no requirement to exhaust administrative remedies with respect to their 42 U.S.C. § 1983 or ADA claims. *See Patsy Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982) (holding that exhaustion of administrative remedies is not necessary to bring a claim under § 1983); *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1061 (9th Cir. 2007) (citing *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1178 (9th Cir. 1999)) ("We recognize that neither Title II of the ADA nor section 504 of the Rehabilitation Act generally requires administrative exhaustion before filing suit."); (*see also* PI Reply at 11).

Plaintiffs have provided substantial evidence that HCA has failed to arrange for the provision of private duty nursing care at home for Plaintiffs and has improperly delegated this responsibility to Plaintiffs' families or parents. The court concludes that Plaintiffs are likely to succeed in their § 1983 claim that HCA failed to provide and arrange for medical assistance with reasonable promptness as required by the Medicaid Act.

b. Title II of the ADA

Plaintiffs have also asserted a claim under the Title II of the ADA. (*See* Am. Compl. ¶¶ 117-36.) Title II of the ADA prohibits discrimination in access to public services by requiring that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The Ninth Circuit has counseled that "the ADA must be construed broadly in order to effectively implement the ADA's fundamental purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002) (quotation marks and alteration omitted).

One form of disability discrimination is a violation of the ADA's "integration mandate." *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 592, 600-01 (1999). This mandate, which is embodied in the ADA and its implementing regulations, specifies that persons with disabilities receive services in the "most integrated setting appropriate to their needs." 28 C.F.R. § 35.130(d) ("A public entity shall administer services, programs,

and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). The integration mandate "serves one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons." *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005). Thus, under Title II of the ADA, HCA has an obligation to provide medically necessary services, such as the private duty nursing services at issue here, in the most integrated setting appropriate to Plaintiffs' needs. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d); *see also Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003) (ruling that a state's failure to provide services to a qualified person in a community-based setting as opposed to a nursing home presents a violation of Title II of the ADA).

In *Olmstead*, the Supreme Court concluded that discrimination under Title II of the ADA includes "unnecessary segregation" and "[u]njustified isolation" of people with disabilities. 527 U.S. at 582, 600-01. The Supreme Court found unjustified isolation of people with disabilities amounts to discrimination because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes everyday life activities of individuals, including family relations, social contacts . . . educational independence, educational advancement, and cultural enrichment." *Id.* at 601. The Court held that "[u]njustified isolation . . . is properly regarded as discrimination based on disability." *Id.* at 597. The Court held that public entities are required to provided community-based services for persons with disabilities who would otherwise be entitled to institutional services when (a) treatment professionals have determined that community-based services are

appropriate for an individual, (b) the individual does not oppose such services, and (c) the services can be reasonably accommodated, taking into account the resources available to the state and needs of others who are receiving disability services from the state. *Id.* at 607.

Here, Plaintiffs assert A.H.R. has been unnecessarily segregated or unjustifiably isolated because he no longer lives at home with his family, instead resorting to care in a group home due to the lack of private duty nursing services. (PI Reply at 4-5.) Plaintiffs also argue that the fact that some Plaintiffs (S.K., K.V. and K.A.S.) still live in their homes does not abrogate their claims under the ADA. (PI Mot. at 13.) "A state's reduction in services may violate the integration mandate where it unjustifiably forces or will likely force beneficiaries from an integrated environment into institutional care" or a segregated setting. *G. v. Hawaii*, No. CIV. 08-00551 ACK-BM, 2010 WL 3489632, at *9 (D. Haw. Sept. 3, 2010) (citing *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1184 (3d Cir. 2003)) (holding that Medicaid participants not currently institutionalized, but at "high risk for premature entry into a nursing home," could bring claims for violation of the integration mandate); *Gaines v. Hadi*, No. 06–60129–CIV., 2006 WL 6035742, at *28 (S.D. Fla. Jan. 30, 2006) (observing that a plaintiff may state an integration claim by asserting that a "reduction in services will force [him] into an institutional setting against [his] will"); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1170 (N.D. Cal. 2009) (noting that "cases involving ADA integration claims have recognized that the risk of institutionalization is sufficient to demonstrate a violation of Title II," and enjoining the enforcement of a law that would reduce the number of Adult

Day Health Care days available to certain Medicaid beneficiaries because the reduction would place the plaintiffs at serious risk of institutionalization); *Mental Disability Law Clinic v. Hogan*, CV-06-6320 (CPS)(JO), 2008 WL 4104460 (E.D.N.Y. Aug. 29, 2008) ("[E]ven the risk of unjustified segregation may be sufficient under Olmstead.")). Here, there is substantial evidence that those Plaintiffs still living at home will likely be forced into group homes or institutionalized care unless they are able to secure 16 hours of private duty nursing care within a short period of time. (*See supra* § II.B.)

HCA also argues that A.H.R. is not "institutionalized" because the group homes, which provide licensed care and supervision to medically fragile children, are "a community-based option available to all [P]laintiffs as an alternative to institutionalization." (PI Resp. at 19.) HCA argues that "medical institutions" are defined under the Washington Administrative Code as hospitals, nursing facilities, psychiatric residential treatment facilities, and residential habilitation centers. (*Id.* at 20 (citing WAC 388-145-1305 and WAC 182-500-0050).) The court, however, does not find the State's definition of a "medical institution" particularly relevant here. Although a residential group home may be the most integrated setting for a disabled adult under similar circumstances, Plaintiffs are not adults but infants and toddlers. "The 'most integrated setting' is the one that 'enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.'" *M.R. v. Dreyfus*, 697 F.3d 706, 734 (9th Cir. 2011.) Simply labeling a setting as "community-based" does not obviate the legal requirement to engage in a fact-based, individualized inquiry. There is no dispute that all of these Plaintiffs have been authorized by HCA to receive in-home, private duty

nursing care and that their physicians approve such care. Accordingly, the "most integrated setting appropriate" to Plaintiffs' needs here is their family homes. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d).

HCA also raises a "fundamental alteration" defense. (PI Resp. at 21-22.) ADA regulations provide that "[a] public entity shall make reasonable accommodations in policies, practices, or procedures when modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). "*Olmstead* made clear that courts evaluating fundamental alteration defenses must take into account financial and other logistical limitations on a state's capacity to provide services to the disabled[.]" *Townsend*, 328 F.3d at 520. When evaluating a fundamental alteration defense, a court must consider "not only the cost of providing community-based care to the litigants, but also the range of services the State provides to others with . . . disabilities, and the State's obligation to mete out those services equitably." *Olmstead*, 527 U.S. at 597. The ADA requires home or community-based placement of disabled persons only if "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with . . . disabilities." *Id.* at 607; *see also Sanchez*, 416 F.3d at 1067-68; *Arc of Wash. State*, 427 F.3d at 618-19. Budgetary concerns alone, however, do not sustain a fundamental alteration defense. *See Fisher*, 335 F.3d at 1183 ("If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed.").

The problem with HCA's argument is that it is unsupported by evidence. (*See* PI Resp. at 21-22.) HCA cites to evidence concerning the efforts it or its MCOs have made to secure the required nursing services for Plaintiffs. (*See id.* at 22 (citing Kreiger Decl. ¶¶ 24-25; Collymore Decl. ¶ 6; Edlund Decl. ¶¶ 9-13).) However, HCA submits no evidence that granting Plaintiffs' motion for a preliminary injunction will result in any fundamental alteration of any other state Medicaid program or result in fund-shifting that would unduly disadvantage any other segment of Washington's disabled population. The record in this case does not show that HCA will likely have to make a fundamental alteration in its medically intensive care program or any other Medicaid program in order to comply with the ADA's integration mandate here. Accordingly, the court concludes that Plaintiffs have shown a likelihood of success on the merits of their claim under Title II of the ADA.[16]

3. Irreparable Harm

Next, the court considers whether Plaintiffs will likely suffer irreparable harm. *Winter*, 555 U.S. at 20. Plaintiffs argue that they will suffer irreparable injury in the absence of a preliminary injunction. (PI Mot. at 14-15.) They point out that A.H.R. has already been forced out of his own home and into a group home as a result of HCA's inadequate provision of private duty nursing services. (*See supra* § II.B.) Plaintiffs have

[16] HCA also argues that Plaintiffs seek the functional equivalent of the writ of mandamus to state court officials. (PI Resp. at 22-23.) To the extent Plaintiffs were seeking a writ of mandamus, the court would lack jurisdiction to enter such a writ against state officials. *See Demos v. U.S. Dist. Court for E. Dist. of Wash.*, 925 F.2d 1160, 1161 (9th Cir. 1991). The court rejects HCA's analogy of Plaintiffs' suit to a writ of mandamus.

submitted substantial evidence that placement of infants and toddlers in institutional settings or group homes can have serious, life-long impact on both their physical and mental health. (*See generally* Cowan Decl.) Plaintiffs also argue that the other three Plaintiffs face serious risks of injury to their health and other harms by living in their homes without adequate nursing support or the serious risk of being forced into a group home or some other institutional settings as a result of HCA's inadequate provision of private duty nursing services. (*See supra* § II.B.)

"Numerous federal courts have recognized that the reduction or elimination of public medical benefits irreparably harms the participants in the programs being cut." *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1121 (N.D. Cal. 2009) (citing *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (holding that the possibility that plaintiffs would be denied Medicaid benefits sufficient to establish irreparable harm); *Newton-Nations v. Rogers*, 316 F. Supp. 2d 883, 888 (D. Ariz. 2004) (citing *Beltran* and finding irreparable harm shown where Medicaid recipients could be denied medical care as a result of their inability to pay increased co-payment to medical service providers); *Edmonds v. Levine*, 417 F. Supp. 2d 1323, 1342 (S.D. Fla. 2006) (finding that state Medicaid agency's denial of coverage for off-label use of prescription pain medication would irreparably harm plaintiffs)); *see also K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 493 (D. Idaho 2014) (finding that developmentally disabled adults were likely to suffer irreparable harm where, due to reduction of payments for home and community-based services, many named plaintiffs in the class action were at risk of being institutionalized, and all of them risked stagnating or more likely regressing in their functional levels because of reduced

levels of support they could afford with their diminished benefits), *aff'd K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962 (9th Cir. 2015); *see also M.R. v. Dreyfus*, 697 F.3d 706, 739 (9th Cir. 2012) (reversing, in an ADA case, the denial of a preliminary injunction seeking to block decreases in state Medicaid expenditures for in home personal care services provided to disabled individuals and concluding the plaintiffs were likely to suffer irreparable injury due to "serious risk of institutionalization"). HCA never addresses these authorities or explains why they would not control here. (*See* PI Resp. at 23.)

HCA argues that "plaintiffs will not suffer irreparable harm if the [c]ourt allows the [HCA] and the MCOs to continue in their attempts to determine the additional services that are needed and may be available." (*Id.*) First, HCA's statement ignores that fact that it has already determined the "services that are needed." There is no dispute that HCA has approved each Plaintiff herein for 16 hours per day of private duty nursing services. (*See* PI Resp. at 10 (citing Kriegler Decl. ¶¶ 11, 12; Edlund decl. ¶¶ 4, 5) ("Each Plaintiff . . . has been authorized by the [HCA] or an MCO to receive in-home nursing care of 16 hours per day.").) Therefore, there is no need for HCA to make additional determinations concerning the services that are needed—that issue has been resolved. Further, the law does not support HCA's position that it is sufficient for it to "attempt[] to determine the additional services that . . . *may* be available." (*Id.* (italics added).) As noted above, Congress has recently clarified that where the Medicaid Act refers to the provision of services, a participating State is required to provide (or ensure the provision of) the services themselves—not simply determine the additional services

that "may be available." 42 U.S.C. § 1386d(a); *John B.*, 852 F. Supp. 2d at 951; *Dunakin*, 99 F. Supp. 3d at 1321; *see also* H.R. Rep. No. 111-299, pt 1 at 649-50. Finally, HCA entirely ignores the abundance of case authority that has found irreparable harm when medical services are eliminated or reduced in similar situations. Accordingly, the court finds that Plaintiffs have established that they are likely to suffer irreparable harm in the absence of a preliminary injunction.[17]

4. Balance of the Equities and the Public Interest

The two final inquires presented by Plaintiffs' motion for a preliminary injunction are whether the balance of hardships tips in their favor and whether the public will benefit from the proposed preliminary injunction. *Winter*, 555 U.S. at 20. These factors may be viewed together. *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077, 1087 (N.D. Cal. 2013) (citing *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 989 (N.D. Cal. 2010)). The court must "balance the interests of all parties and weigh the damage to each." *L.A. Mem'l Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). In conjunction, the court must consider "whether there exists some critical public

[17] HCA argues that this situation is not like cases in which a state agency has eliminated medical services for certain groups of individuals or eliminated or reduced funding for such services because here HCA has not denied that Plaintiffs are eligible for Medicaid, not "denied coverage for any aspect of the full scope of Medicaid services," and not "denied requests for coverage of in-home nursing services." (*See* PI Resp. at 10, *see also id* at 23 ("The situation might be different if the [HCA] had denied . . . [P]laintiffs eligibility for Medicaid, or if the [HCA] and the MCOs had rejected authorization for nursing services, or if the [HCA] or the MCOs had refused to try to find nursing services.").) The court, however, can discern no difference in the irreparable harm to Plaintiffs or the balance of equities regardless of whether the State overtly denies services that are due, eliminates or reduces funding for such services, or authorizes such services but then fails in its duty to provide the services. The harm to Plaintiffs is the same in any of these events, and as discussed below, the balance of equities still favors Plaintiffs.

interest that would be injured by the grant of preliminary relief." *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009), *vacated in part on other grounds, sub nom Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, --- U.S. ---, 132 S. Ct. 1204 (2012).

> In the context of providing public benefits, the Ninth Circuit has observed:
>
> We have several times held that the balance of hardships favors beneficiaries who may be forced to do without needed medical services over a state concerned with conserving scarce resources.

M.R. v. Dreyfus, 697 F.3d 706, 737-738 (9th Cir. 2011) (citing, as an example, *Indep. Living Ctr. of S. Cal.*, 572 F.3d at 659 (holding that state budgetary considerations do not, in social welfare cases, constitute a critical public interest that would be injured by injunctive relief)). The fact that HCA may incur expenses while providing these benefits to Plaintiffs pending the outcome of the litigation does not outweigh the harm to Plaintiffs in the absence of the benefits. "Faced with . . . a conflict between financial concerns and preventable human suffering, [the court] has little difficulty concluding that the balance of hardships tips decidedly in Plaintiff[s'] favor." *See Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983); *see also Haskins v. Staton*, 794 F.2d 1273, 1277 (7th Cir. 1986) (finding that where an injunction seeks to require defendants to comply with existing law, the injunction imposes no burden but "merely seeks to prevent the defendants from shirking their responsibilities"). Further, the Ninth Circuit also recognizes a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress recognizes as the most needy in the country. *M.R.*, 697 F.3d at 738.

In any event, it is not clear that HCA will save money by failing to provide the in-home nursing care at issue here given the higher costs of institutionalized or group home care or the costs that HCA may have to incur should the lack of private duty nursing services result in injury to Plaintiffs. Indeed, in its Decision Package, HCA has acknowledged that "[i]ncreasing the utilization of skilled nursing services for children is a better use of state dollar[s] than paying for . . . more costly alternatives," such as "extended hospital stays, emergency room visits, [and] inpatient readmissions." (Crain Decl. Ex. B at 2.) Thus, the balance of hardships favors Plaintiffs "in light of evidence in the record that suggests that [the action to be enjoined] may have an adverse, rather than beneficial, effect on the State's budget." *M.R.*, 697 F.3d at 738 (citing *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1098 (9th Cir. 2010)). Given these considerations, the court finds that both the balance of the equities and the public interest favor Plaintiffs.

In sum, the court finds that all of the factors set forth in *Winter* for granting a preliminary injunction favor Plaintiffs and decidedly so. In the absence of a preliminary injunction, the health and welfare of Plaintiffs is at grave risk. The court concludes that Plaintiffs have met the heightened standard for imposition of a mandatory preliminary injunction.

5. The Scope of the Preliminary Injunction

The court now considers the scope of the preliminary injunction that should be imposed. Indeed, many of HCA's arguments appear to be aimed at its concerns regarding the scope of the preliminary injunction and its mandatory nature. (*See* PI Resp. at 14-15.) The injunction Plaintiffs request is as follows:

> Defendants are enjoined from failing to take all actions within their power necessary to make medical assistance available and to arrange for . . . Plaintiffs to receive 16 hours per day of private duty nursing, as arranged and agreed by Plaintiffs and their medical providers.

(Prop. PI Ord. at 12.) In *Katie A., ex rel. Ludin v. Los Angeles County*, 481 F.3d 1150, 1152 (9th Cir. 2007), the plaintiffs alleged that they and a similarly-situated class of individuals were entitled to and had not received "medically necessary mental health services in a home-like setting." *Id.* at 1152. The district court granted the plaintiffs' motion for a mandatory preliminary injunction directing the state defendants to screen members of a statewide class of foster children and, where medically necessary, provide the children with certain forms of mental health and therapeutic foster care. *Id.* at 1151. Although the Ninth Circuit ultimately held that the district court had misinterpreted the Medicaid Act with respect to the type of mental health services that the state was required to provide, the Ninth Circuit found no error in the district court's articulation or application of the legal standard for issuance of a mandatory preliminary injunction. *Id.* at 1156. In so ruling, the Ninth Circuit stated:

> First, the district court correctly described the applicable test for the granting of a preliminary injunction . . . as well as the heightened standard that applies to mandatory injunctive relief . . . . Second, in concluding that plaintiffs were entitled to a mandatory preliminary injunction, the district court correctly applied these tests. The court found that plaintiffs had a strong likelihood of success on the merits of their Medicaid Act claims. It also discussed the possibility that plaintiffs would face unnecessary institutionalization without the preliminary injunction, recognized that such harms were "grave," and rejected defendants' arguments that plaintiffs failed to show that they faced irreparable harm. It is evident that the court concluded that plaintiffs faced the potential for irreparable injury without the injunction. . . . The court's finding of a strong likelihood that plaintiffs would succeed on the merits of their claims also evidences a conclusion

> that the law and facts clearly favor plaintiffs, meeting the requirement for issuance of a mandatory preliminary injunction.

Id. at 1156-57 (footnote and internal citations omitted). As in *Katie A., ex rel. Ludin*, this court has recognized and applied both the test for a preliminary injunction and the heightened test for entry of a mandatory injunction.[18]

In addition, as in *Katie A., ex rel. Ludin*, the court explicitly recognizes "the federalism principles that require federal courts to grant each state the widest latitude in the dispatch of its own internal affairs and to find a threat of immediate and irreparable harm before enjoining a state agency's operations." *See Katie A., ex rel. Ludin*, 481 F.3d at 1157 (internal quotation marks omitted). Based on the court's discussion of the harm Plaintiffs face in the absence of sufficient private duty nursing care, *see supra* § III.C.3, there is no doubt that the court finds a threat of immediate and irreparable harm to Plaintiffs in the absence of a preliminary injunction. Further, the preliminary injunction Plaintiffs request "require[s] only that defendants supply the services that the court found to be required under federal law." *Katie A., ex rel. Ludin*, 481 F.3d at 1157. "It [does] not mandate detailed or burdensome procedures for compliance." *Id.* Further, like the district court in *Katie A., ex rel. Ludin*, this court will "allow[] defendants an opportunity jointly to develop the remedial plan needed to implement the injunction." *See id.* at 1157. In order to effectuate the court's order, counsel for HCA and for Plaintiffs shall meet and confer and develop a plan for implementing this preliminary injunction. Among other

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[18] Further, the court applied the more recent formulation of the test for a preliminary injunction as articulated by the Supreme Court in *Winter*. 555 U.S. at 20.

things, the plan must identify the responsibilities of Defendants, the need for additional providers, methods of finding, securing, and retaining additional providers, and a timeline for accomplishing needed tasks. In negotiating the plan, counsel shall diligently and in good faith take into account and apply this court's rulings and observations in this case. "No further deference [i]s required." *Id*.

6. Bond Requirement

Federal Rule of Civil Procedure 65(c) "invests the district court with discretion as to the amount of security required, *if any*." *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003) (internal quotation marks omitted; italics in original). Plaintiffs, who are Medicaid recipients, request that the court waive the bond requirement on grounds that they are indigent. (PI Mot. at 22-23.) Counsel for HCA acknowledged during oral argument that, if the court were to impose a preliminary injunction here, it should not require Plaintiffs to post a bond. Accordingly, the court will not require Plaintiffs to post a bond for the preliminary injunction to take effect.

IV. CONCLUSION

Based on the foregoing, the court DENIES HCA's Rule 19 motion (Dkt # 24), and GRANTS HCA's motion to continue (Dkt. # 28).

In addition, the court GRANTS Plaintiffs' motion for a preliminary injunction (Dkt # 6) as more fully described herein and specifically ORDERS as follows:

Pursuant to Federal Rule of Civil Procedure 65(a), Defendants shall take all actions within their power necessary for Plaintiffs to receive 16 hours per day of private duty nursing, as previously authorized by Defendants and arranged and agreed to by

Plaintiffs and their medical providers. In order to effectuate this requirement, counsel for Defendants and Plaintiffs shall meet and confer as soon as practicable and develop a plan for implementing the preliminary injunction. Among other things, the plan must identify the responsibilities of Defendants, the need for additional providers, methods of finding, securing, and retaining additional providers, and a timeline for accomplishing needed tasks. However, Defendants may not defer or delay their efforts to provide the required private duty nursing care to Plaintiffs while the parties are developing the plan. In negotiating the plan, counsel shall diligently and in good faith take into account and apply this court's rulings and observations. Not later than 30 days from the entry of this order, Defendants and Plaintiffs shall file a joint status report regarding the status of effectuating the preliminary injunction.

Dated this 7th day of January, 2016.

JAMES L. ROBART
United States District Judge